

**MANAGING THE LEGAL FACTOR: THE LEGAL IMPLICATIONS OF
BUSINESS DECISION MAKING**

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[Business] feels increasingly the need for educated [persons] who have breadth, perspective, and flexibility of mind to cope with a business environment that grows in complexity and changes with bewildering rapidity.¹

I. INTRODUCTION

The evolution of legal studies in business may be segmented into two eras. First, the pre-1960 era when *traditional business law* courses defined the curriculum. The second strain of business law courses, popularly referred to as *legal environment* courses, trace their genesis to two influential studies on business schools that were published in 1959. The Gordon-Howell and Pierson reports questioned the utility of the traditional business law course.² Instead, they recommended the development of courses that would better alert future business persons to the legal implications of their decisions. The result was the development of legal environment texts and courses which moved away from a singular focus on traditional substantive law topics associated with the memorization of *black letter* rules.³ Instead, the student was exposed to a broader analysis of the legal environment of

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¹ ROBERT A. GORDON & JAMES E. HOWELL, HIGHER EDUCATION FOR BUSINESS 5 (1959).

² *Id.* See also Frank Pierson, The Education of American Business [Persons] (1959).

³ One author clearly states that the "retention of rules of law per se is not of paramount concern." TONY A. MCADAMS, LAW, BUSINESS, AND SOCIETY viii. (4th ed. 1995).

business. This included material covering legal institutions,⁴ legal environment,⁵ and the regulatory environment.⁶

A third approach⁷ to the study of business law can also be traced to the Gordon-Howell and Pierson studies. This strain or approach may be referred to as courses dealing with the legal implications of business decision making. This article will use the more manageable label by referring to this type of course as *managing the legal factor*. This genre of teaching materials has an interesting but relatively undocumented history. An example of the influence of this curricula development can be found at the University of Miami. Along with traditional business law-type of courses⁸ the curriculum includes a number of legal environment courses.⁹ More recently, a third strain of legal studies courses has been implemented at the undergraduate and graduate levels.¹⁰ The University of Miami's capstone course for Legal Studies majors,¹¹ *Managing The Legal Factor*, has been around for a

⁴ Examples are sources of law, the court system, the litigation process, and alternative dispute resolution.

⁵ Examples are contracts, torts, products and service liability, criminal law and business, business organizations, and international business transactions.

⁶ Examples are ethics, self-regulation, government regulation, discrimination, employment law, labor-management relations, antitrust law, regulation of marketing activities, consumer protection, securities regulation, and environmental laws.

⁷ This article's reference to *Managing The Legal Factor* as a distinct strain in the business law curriculum may be an overstatement and may be misleading. Instead, a recognition that there may be different strains or *approaches* within the genre of legal environment studies may be a better way to address the issues raised in this article. In fact the legal environment curriculum may never have been the homogenous animal that this historical review intimates. A better view is that legal environment courses are made up of a bundle of different approaches. *Managing the Legal Factor* may be considered as a different approach to studying the legal environment of business. A case for recognition of other approaches to teaching the legal environment of business may surely be made. See, e.g., McAdams, *supra* note 3. "[W]e take an interdisciplinary approach, utilizing elements of law, political economy, international business, ethics, social responsibility, and management." *Id.* at vii.

⁸ Examples are Introduction To Business Law, Commercial Paper, Business Organizations, Real Estate, International Business Law, Ocean Law, Health Law, and Advanced Business Law.

⁸ Examples are Ethical And Legal Implications of Business Decision Making and Legal And Social Aspects of Business Regulation.

¹⁰ Examples are *Managing The Legal Factor* (undergraduate) and *Legal Implications of Executive Decision Making* (graduate).

¹¹ The University of Miami School of Business added a major in Legal Studies in the fall of 1986. The intended purpose of the Legal Studies major is to "develop business executives capable of understanding and managing the daily implications of their business..." See Rene Sacasas & Anita Cava, *A Legal Studies Major: The Miami Model*, 9 J. LEGAL STUD. EDUC. 339 (1991).

number of years.¹² However, it has been a course without a textbook. That recently changed with the publication of *Managing The Legal Factor: Business Law Text and Cases* by professors Donald Wiesner and Nicholas Glaskowsky.¹³ A review of the Wiesner and Glaskowsky text provides an opportunity for a two-fold analysis: first, a microanalysis of the evolution of the *Managing The Legal Factor* text to determine how it differs from the more standard business law¹⁴ and legal environment¹⁵ texts, and second, a more conceptual or macroanalysis of the evolution of the business law curriculum and the placement of the *Managing The Legal Factor* approach within that curriculum.

Early business law texts covered a singular substantive area of law namely, contracts. The earlier texts differ from their current counterparts in a number of ways. They contained little coverage of the place of law in society, of legal institutions, sources of law, the court system, or alternative dispute resolution. An example of this earlier genre of business law text was Carey and Kelner's *Principles of Contract Law*.¹⁶ This text illustrates the coverage of a typical course in business law, circa 1950. The book's twenty-seven chapters include twenty-four dedicated to black letter contract law,¹⁷ an introductory chapter, one chapter on court and court procedure,¹⁸ and a concluding chapter on arbitration. Thus, business law was in essence

¹² *Id.* The authors explain that it was the Business Law faculty's intent to devise a capstone course for the school's new Legal Studies major based on the following premise: [It] is grounded on the premise that business managers can be taught to recognize and intelligently handle many of the legal implications of their business decisions." *Id.* at 340.

¹³ DONALD WIESNER & NICHOLAS GLASKOWSKY, JR., *MANAGING THE LEGAL FACTOR* (1995).

¹⁴ See, e.g., HENRY R. CHEESEMAN, *BUSINESS LAW* (1992); ELLIOT I. KLAYMAN, JOHN W. BAGBY & NAN S. ELLIS, *IRWIN'S BUSINESS LAW* (1994); MARK E. ROSZOWSKI, *BUSINESS LAW: PRINCIPLES, CASES, & POLICY* (1987).

¹⁵ See, e.g., ROBERT N. CORLEY, O. LEE REED, & PETER J. SHEDD, *THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS* (9th ed. 1993); MICHAEL B. METZGER, JANE P. MALLOR, A. JAMES BARNES, THOMAS BOWERS, MICHAEL J. PHILLIPS, & ARLEN W. LANGVARDT, *BUSINESS LAW AND THE REGULATORY ENVIRONMENT* (9th ed. 1995); THOMAS W. DUNFEE, JANICE R. BELLACE, & DAVID B. COHEN, *BUSINESS AND ITS LEGAL ENVIRONMENT* (3d ed. 1992).

¹⁶ MICHAEL T. CAREY & MILTON KELNER, *PRINCIPLES OF CONTRACT LAW* (1950).

¹⁷ Examples are offer, acceptance, termination of offers, consideration, capacity, reality of consent, illegal bargains, formality in contracts, operation of contracts, discharge of contracts, and remedies. Note that the text preceded the enactment of the Uniform Commercial Code and was limited in its coverage to purely common law.

¹⁸ This chapter is a scant fourteen pages of coverage on the state and federal court systems, and elements of the law of civil procedure. The student is not likely to bring away much useful information from such a cursory review.

a course in contracts and little else.¹⁹ These earlier business law texts also differed greatly from current versions in the style of presentation. The style was exclusively textual.²⁰ Principles of law are recited in black letter form²¹ and illustrated by short hypothetical examples. Absent are real life cases as captured in judicial opinions. This provided the basis for Gordon-Howell's argument that these courses provided little benefit other than to sharpen certain vocational skills.²² The narrowness in scope of the subject matter and the style of its presentation did little to sharpen the student's analytical skills. Thus, such courses did not satisfy the standards of a liberal arts education.²³

A typical 1960s era text was Wyatt and Wyatts' *Business Law Principles And Cases*.²⁴ This 1966 text helps illustrate the widening in scope of a typical business law text in little over a decade and a half. Two important events transpired from the time of the Carey- Kelner text to the publication of the Wyatts' text. First, the Uniform Commercial Code²⁵ was adopted as the first promulgation of "a comprehensive act covering the entire field of commercial transactions."²⁶ Second, the Gordon-Howell and Pierson studies were established in 1959.

The third edition of Wyatt and Wyatt reflects the tremendous impact that these two events had on the business law curriculum. First, the scope of topics covered is substantially widened. A heavy focus upon contracts persists, but is segmented into the law of contracts and the law of sales as codified in the Code. Also, the expansion

¹⁹ Even though the text's title is *Principles of Contract Law*, it was as a typical business law text of that period. The authors state that "[a]ttention has been given to the character of the business law courses offered in the leading institutions of learning throughout the country with the view of giving this complicated subject its most lucid treatment." Carey & Kelner, *supra* note 16, at 3.

²⁰ The authors freely acknowledge this approach in their introduction. "An attempt will be made here to provide *textual* material for students taking a course in business law, and to *answer such practical questions* as are likely to perplex the businessman." *Id.*

²¹ Black letter law consists of straight-forward, precise statements of the rules of law as distilled from the primary sources of law. Primary sources of law include statutes, administrative regulations, executive orders, and case law.

²² Memorization skills are an example. *See infra* notes 42 and 49.

²³ *See infra* notes 54 and 63 and accompanying text.

²⁴ JOHN WYATT & MATTIE WYATT, *BUSINESS LAW PRINCIPLES AND CASES* (3d ed. 1966).

²⁵ The Uniform Commercial Code was the product of a combined effort of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The First Edition of the Code was published in 1952. By the time of the publication of the Wyatts' text forty-one states had adopted the Uniform Commercial Code.

²⁶ *See* Wyatt & Wyatt, *supra* note 24, at 11.

of business law into other substantive law areas is pronounced. Additional topics covered include the law of agency, commercial paper, bailments, secured transactions, business organizations, property, insurance, bankruptcy, wills and trusts. The Gordon-Howell demand for a broader approach to legal studies education²⁷ is reflected by the inclusion of material on legal institutions, the nature and sources of law, the judicial system, and the nature of torts and crimes.²⁸

Stylistically, truncated versions of judicial opinions appear as a distinctive tool not found in the older business law texts. However, pedagogically the cases are not a central part of the text's approach to teaching. The material is still presented very much in the same manner as earlier black letter texts. The cases are located in a separate section at the end of each chapter. The lack of integration of cases with the narrative indicates this as a transitional stage in the development of the business law curriculum.

The transitional nature of this period is also illustrated by the introduction of the first generation of legal environment texts. Houghteling and Pierce's *The Legal Environment of Business* was published in 1963.²⁹ There is a clear departure from the traditional substantive texts previously discussed. Instead of pure substantive law, the process by which substantive law is created is considered to be of equal importance. The importance of the legal environment of business dictates a need to educate students on "the *institutions* and *processes* by which law is created."³⁰ The second major departure is the use of actual cases as an integral and integrated part of the text.³¹ "It has been our experience...that legal principles come alive only when students read about actual cases as reported in judicial decisions."³²

Wiesner and Glaskowsky's *Managing the Legal Factor* offers innovative coverage not seen before in traditional business law or legal environment texts. Substantive business law topics are combined

²⁷ *See infra* notes 49 and 54.

²⁸ A better example of the broader approach envisioned by Gordon-Howell would be HAROLD J. GRILLIOT, *INTRODUCTION TO LAW AND THE LEGAL SYSTEM* (2d ed. 1979).

²⁹ JAMES HOUGHTELING, JR. & GEORGE PIERCE, *THE LEGAL ENVIRONMENT OF BUSINESS* (1963).

³⁰ *Id.* at v.

³¹ It is now widely accepted that "[s]tructuring a class using a case study framework forces students to take a broader and more complete approach to incorporating legal issues into the decision making process." Diane B. MacDonald, *Turning War Stories Into Case Studies*, 9 J. LEGAL STUD. EDUC. 437,439 (1991).

³² Houghteling & Pierce, *supra* note 29, at v-vi.

with a managerial approach.³³ Two chapters are dedicated to the managerial approach of controlling and reducing legal costs.³⁴ Five chapters discuss law, lawyers and institutions.³⁵ One of these chapters is dedicated to the training and mind-set of attorneys. Another gives guidance on how a manager may best work with legal professionals. The chapter on business ethics questions the use of lawyers and of legal technicalities in order to avoid the settling of a dispute or to prevent a decision “upon the merits.”³⁶ The remaining coverage of the text is a selection of substantive law topics. The topics include the traditional coverage of contracts, business organizations, financial transactions, marketing, and real property. This business law coverage is coupled with materials most often found in legal environment texts. These include a review of the administrative law process and employment law. Also included is a chapter on international business law.

The focus of the substantive law topics has also gone through a metamorphosis.³⁷ Thirty-five percent of the real property law material is allotted to environmental concerns.³⁸ The traditional

³³ The managerial approach of the text is no doubt influenced by the fact that the authors, one from business and the other from management, bring two different perspectives to their work. For example, in the material on the interfacing of business managers with attorneys, the perspectives of the business person and the attorney are both brought to bear. For example, in the material on *Programs For Reducing Legal Costs* the authors probe “ways in which the firm might look at legal implications [of business-decision making] and develop strategies for achieving more effective control over legal costs.” Wiesner & Glaskowsky, *supra* note 13, at 67. The authors offer the use of a management philosophy known as Total Quality Management (TQM) as a device or strategy that can be used in a legal cost reduction program. *Id.* at 68.

³⁴ *Id.* (Chapter 1 on Objectives and Methodology and Chapter 2 on Legal Costs).

³⁵ *Id.* at 83-319.

³⁶ The authors question the “reliance on legal rules to draw moral lines.” *Id.* at 239. The vehicle of legal technicalities is used to test the premise that in the “competitive world of business, it is a lot easier to talk good ethics ... than to practice it.” *Id.* at 224. *Colwell v. Eising*, 827 P.2d 1005 (Wash. 1992) is used to illustrate the writing technicalities of the Statute of Frauds.

³⁷ For example, traditional real property law is covered as a discussion of the different legal interests that one can have in real estate, such as leases, mortgages, easements, fixtures. This is coupled with a more nontraditional section on *Purchase and Sale Contracts*. The importance of the negotiation of contract terms and conditions is placed on the shoulders of the business manager instead of simply delegating it as the responsibility of legal counsel. The business importance of a contractual boilerplate is emphasized with an analysis of selected clauses, such as inspection and repair and finance clauses. *Id.* at 663-664.

³⁸ *Id.* at 671-686. The author’s *Management Insight* concludes that “this is an area in which full managerial awareness of applicable laws and regulations is mandatory.” *Id.* at 686.

Willistonian elements or formalities of the classical theory of contracts are covered.³⁹ However, the black letter rendition of offer, acceptance, consideration, consent, capacity, legality of subject matter, and the Statute of Frauds is tempered with the managerial perspective. The general principles of law are followed by a discussion of the associated business risks of electing to do business in violation of the general legal precepts. For example, the infant’s right to disaffirm most consumer contracts is counterbalanced with the realization that our economy includes “multibillion dollar industries that solicit the young.”⁴⁰ Thus, despite the severity of the infancy law doctrine, “if the issue is the sale of a large number of small-ticket items to a large number of minors, the business risk is considerably diminished.”⁴¹ The quality of the text may help advance the cause of those who hope to make *Managing The Legal Factor* a staple course of instruction in collegiate schools of business. Only time will tell if this new approach to educating future managers will excite and convert a sufficient number of professors of legal studies education. The purpose of this article is to analyze whether or not this approach conceptually differs from what currently exists in most legal studies curricula. Does it offer a third dimension to be added to the current duality of business law and legal environment? Can it be seen as an attack upon the liberal arts’ citadel of legal studies education⁴² espoused by Professors Gordon, Howell, and Pierson in the 1950s and 1960s?⁴³ Is the concept of managing the legal factor a return to vocational legal studies so vehemently despised by Gordon-Howell?⁴⁴ Alternatively, can it be seen as an advancement of our prime directive to educate our business stu

³⁹ Traditional or classical contract theory is most closely associated with the influential writings of Professor Samuel Williston. Traditional contract theory focuses upon whether or not there was a reaching of mutual assent at the time of contract formation. This classical view of contracts is often referred to as the *bargain principle*. See generally RESTATEMENT (SECOND) OF CONTRACTS § 75 (1979); SAMUEL WILLISTON, WILLISTON ON CONTRACTS (3d ed. 1958). Compare GRANT GILMORE, THE DEATH OF CONTRACT (1974) (arguing that reliance theory or promissory estoppel has swallowed

up the bargain principle).

⁴⁰ See Wiesner & Glaskowsky, *supra* note 13, at 355.

⁴¹ *Id.* at 356.

⁴² “A few institutions have been experimenting with new curricula designed to provide a more rigorous professional training within the context of a *liberal education*.” Gordon & Howell, *supra* note 1, at Foreward (emphasis added).

⁴³ See generally JAMES H. S. BOSSARD & J. FREDERICK DEWHURST, UNIVERSITY EDUCATION FOR BUSINESS: A STUDY OF EXISTING NEEDS AND PRACTICES (1931); Pierson, *supra* note 2; Gordon & Howell, *supra* note 1.

⁴⁴ “Although schools of business administration have now been assimilated into the academic structure...many problems still remain. The *vocational approach* that has all too often characterized these schools in the past is now considered inadequate.” Gordon & Howell, *supra* note 1, at Foreward (emphasis added).

dents to analyze, to think, and most importantly to manage? Can the managing the legal factor concept be viewed as a reaction to the massive change in the legal environment of business that has occurred in the past few decades? These are difficult questions indeed! To answer these questions one must first look at what has come before.

II. THE EVOLUTION OF THE BUSINESS AND BUSINESS LAW CURRICULUM

A. THE GORDON-HOWELL AND PIERSON STUDIES

The history of business education in general and legal studies in business, more specifically, is not a long and storied one.⁴⁵ “Collegiate business education is largely a product of the twentieth century.”⁴⁶ That product has swayed between a number of poles. The first set of poles revolve around the issue of whether or not a business education should be vocational or “liberal” in nature.⁴⁷ A secondary issue is whether or not business students should be offered a generalized or a specialized education.⁴⁸ Professors Gordon and Howell speak to the first duality by referring to the “low level and narrow vocational character of much of collegiate business education.”⁴⁹ They argued that the vocational nature of business education existing at the time of their study should be transplanted by a curriculum directed at improving the students’ “qualities of mind and character and the professional-type skills for which business and society have the greatest

45.[Business law] was one of the first subjects [in the area of business] introduced into high schools...” *The Business Curriculum*, Monograph 76, at 23 (South-Western 1951), (on file with author). For a concise review of the historical development of schools of business see PAUL S. HUGSTAD, *THE BUSINESS SCHOOL IN THE 1980s: LIBERALISM VERSUS VOCATIONALISM* 1-10 (1983).

46.Gordon & Howell, *supra* note 1, at 4.

47 One commentator further distinguishes between a general or liberal arts education and a professional education. He argues for the latter “since business [education] was first seen as a field for professional university-lead education when the Wharton School was founded in 1881...” PETER DRUCKER, *PREPARING TOMORROW’S BUSINESS LEADERS TODAY* 261-262 (1969).

48.For the distinct and different relationship between a specialist and a generalist in business has profound implications for business education...” *Id.* at 263.

49 Gordon & Howell, *supra* note 1, at 6. The vocational approach to business education ranged from secretarial-type skills to black letter business law. The removal of paralegal studies from some curricula may be seen as reaction by some business schools not to partake in “unrespectable vocational training.” *Id.* at 4.

need.”⁵⁰ Professor Pierson in an equally influential work arrived at a similar conclusion.⁵¹ He saw the need for future curricula development to be centered in “four foundation areas—quantitative methods, economics, *law and public policy*, and psychology-sociology.”⁵² Pierson believed that these foundation subjects would lay the basis for a more efficient study of business decision-making and managerial policy making. These views became widely accepted and the *professional status* given to today’s business degrees is proof of how far business schools have come from their days as “entrepreneurial trade schools.”⁵³

The outcome of the debate over the second duality is less than clear. The arguments in favor of graduating students possessing a liberal, generalized-type of education and of educating students with more specialized skills and knowledge are of equal merit and validity.⁶⁴ Ultimately, there may be no singular, clear answer to this dilemma. The answer is a more ambiguous realization that business education, legal and nonlegal, should be a blend of specialized and generalized skills and knowledge. Professor Pierson states that the business school curriculum should be designed to give the business student “minimum competence in a broadly defined specialty.”⁵⁵ Thus, specialization should not be viewed as the paramour of vocational education. Gordon and Howell recognized the importance of this distinction and of the need for a generalized-specialized blend in business education. “[B]usiness looks to the colleges to give it generalists and specialists, *if possible embodied in the same person.*”⁵⁶

⁵⁰ *Id.* at 6.

51.Pierson, *supra* note 2.

⁵² *Id.* at 266.

⁵³ One commentator describes the impact of the Gordon-Howell and Pierson studies as follows: “[They were] given wide attention at the time and [they] continue [to] influence [the] business schools of today.” Hugstad, *supra* note 45, at 10.

⁵⁴ Professors Gordon and Howell argue that dual needs of business dictates that schools of business graduate generalists thinkers possessing specialized knowledge:

Business itself is pulled in two directions. It feels increasingly the need for educated [persons] who have breadth, perspective, and flexibility of mind to cope with a business environment that grows in complexity and changes with bewildering rapidity. Yet it also feels the pressure for more and better trained specialists who can master the technical problems that have been spawned by the technological and organizational revolution of the twentieth century.

Gordon & Howell, *supra* note 1, at 5.

⁵⁵ Pierson, *supra* note 2, at 266.

⁵⁶ Gordon & Howell, *supra* note 1, at 5 (emphasis added).

B. The 1960s And The 1970s: A Time Of Growth And Change

The tension between the alternative purposes of business education that were discussed by Gordon and Howell was re-examined by Professor Hugstad in his 1983 book titled, *The Business School In The 1980s: Liberalism Versus Vocationalism*,⁵⁷ Hugstad acknowledges the 1980s' trend toward greater specialization. However, the *specialization craze* was not openly accepted by business school administrators as a curricula improvement. "[M]any deans preferred] to moderate the trend toward curricula specialization."⁵⁸ In contrast, "the highly competitive job market...call[ed] for career-oriented, highly specialized programs."⁵⁹ Thus, the pendulum⁶⁰ grudgingly swung from the generalists pole towards the more specialized curricula found currently in some of our schools of business.⁶¹ Hugstad harkens back to Pierson and Gordon-Howell when he warns that "business schools must reaffirm their central role as one of developing decision-making skills and *resist calls to provide vocational skills*."⁶²

Ultimately, to survive and prosper business schools must respond to the perceived needs of the business community. The labeling of a course as *vocational* and thus beneath the standards set by a vague notion of professionalism is misguided. It is not so much the topic but how the topic is taught that should be the true gauge of professionalism. Our mandate should be to teach all courses in a way to graduate students who possess liberal arts' goals of training persons to be "critical thinkers."⁶³ If students obtain some useful vocation skills along the way, so much the better.⁶⁴ In short, the "business program

⁵⁷ Hugstad, *supra* note 45.

⁵⁸ *Id.* at 95.

⁵⁹ *Id.*

⁶⁰ Professor Hugstad believes that the pendulum between liberalism and vocationalism in our business schools "presently [circa 1983] stands squarely between these poles." *Id.* at 118.

⁶¹ For example, in the area of legal studies in business the University of Miami offers approximately twenty different courses as well as a Legal Studies major. See Sacassas and Cava, *supra* note 11.

⁶² Hugstad, *supra* note 45, at 117.

⁶³ The use of business law, legal environment, and legal cases to train students as critical thinkers has been a widely recognized goal of legal studies education. "The preface of most legal environment of business textbooks refers to teaching students to engage in legal analysis or *improving their thinking skills*." Andrea Giampetro-Meyer & Nancy Kubasek, *The Research Paper: A Tool For Developing Critical Thinking Skills in The Legal Environment of Business Classroom*, 9 J. LEGAL STUD. EDUC. 317 (1991). See also Art Wolfe, *Teaching Business Law in the 1980s: From Law as Rules to Law as a Way of Seeing*, FOCUS ON LEGAL STUDIES, 5, Spring 1987, at 4.

⁶⁴ For example, one may irrationally argue that computer science or computer information services are tainted with an aura of vocationalism. However, few would disagree that in our high-tech world such knowledge and skills are essential.

[should]...combine [the generalism of] a 'liberal arts' education with [the specialization of] a 'professional' education."⁶⁵ In the area of legal studies in education we should always bear in mind that our task is not to produce *amateur lawyers* but to produce managers competent in understanding and managing the legal factor in making business decisions.

C. THE EVOLUTION OF THE LEGAL STUDIES CURRICULUM: FROM BUSINESS LAW TO LEGAL ENVIRONMENT TO MANAGING THE LEGAL FACTOR

Legal studies education has come a long way from 1931 when "[a]ll but two of the thirty-eight members [of the American Association of Collegiate Schools of Business] require[d] instruction in business law."⁶⁶ This requirement was serviced by the offering of "one or two general courses in business law."⁶⁷ But even at this early date of curriculum development "the larger aspects of business law teaching"^{68*} were recognized. Dean W. H. Spencer of the University of Chicago wrote in 1921 that the real purpose of *teaching law* to future businesspersons is to:

[A]ssist [them] in visualizing more clearly the structure of modern society, by showing [them] the part which law and legal institutions have played in its development. The study should give the student a practical knowledge of the legal devices which business [persons] use in the administration of their affairs. ...This desideratum, if realized, should prove to be of the greatest value to the future business [person].⁶⁹

This *vision of modern society* is constantly in a state of flux. Nowhere has this change been more rapid than in the area of the legal environment of business.⁷⁰ Both Gordon-Howell and Pierson ques-

⁶⁵ Nathan A. Bailey, *The Relationship of Graduate To Undergraduate Education in Business Administration*, in THE DYNAMIC WORLD OF EDUCATION FOR BUSINESS: ISSUES, TRENDS, FORECASTS 86-87 (Preston P. Le Breton ed., 1969).

⁶⁶ BOSSARD & DEWHURST, *supra* note 43, at 403.

⁶⁷ *Id.* at 405. However, the authors acknowledge the genesis of legal environment and business ethics courses. "Such growth has come, in some instances, by...considering regulation as a problem of business development [and]...business ethics [as]...the self-regulatory function of business." *Id.* at 410.

⁶⁸ *Id.* at 407.

⁶⁹ DEAN W. H. SPENCER, LAW AND BUSINESS xii (1921).

⁷⁰ "The profession of law in its relation to business has changed greatly over the past fifty years...[T]he profession grew in the 1920's to the large firm which performed more of an advisory service than a litigating service." *An Analysis of The Business Curriculum*, Monograph S-14, at 48 (South-Western 1966) (emphasis added) (on file with author).

tioned the usefulness of the business law courses being offered at the time. In fact, Gordon-Howell called for the elimination of the traditional business law course as a curriculum requirement.⁷¹ Instead, they advocated the development of a broader based course dealing with the "legal framework"⁷² in which business operates. "Such a course might seek to familiarize the student with the fact that all business must be conducted within the framework of the law, that such a *legal environment* forms the basis for rules of conduct among business [persons], and that a broad comprehension of the law is essential in setting business policy."⁷³ What developed from these reports was the creation of courses popularly labeled as the legal environment of business. For example, the first edition of *The Legal Environment of Business* appeared in 1963.⁷⁴ The authors of this popular text state that the "first edition arose out of a belief that the traditional business law course does not adequately educate business students about the law."⁷⁵

The ever-changing nature of law and its relation with business, along with growth of the importance that law plays in business decisions, leads one to question whether or not an additional approach or approaches may be warranted. The importance of developing different approaches to teaching in business has been recognized by the American Association of Collegiate Schools of Business. "It has encouraged schools to experiment with new curricula designed to provide a more rigorous professional training within the context of a sound general education."⁷⁶ The development of new courses and new approaches to the teaching of legal studies must invariably go through what Professor Summers terms in a different context as "pragmatic instrumentalism."⁷⁷ Law and by consequence legal studies

⁷¹ Gordon & Howell, *supra* note 1, at 204-05, 268.

⁷² *Id.* at 204.

⁷³ *Id.* at 205 (emphasis added). See also Pierson, *supra* note 2, at 212-13.

⁷⁴ CORLEY, REED & SHEDD, *supra* note 15 (formerly *The Legal Environment of Business*). The reason for the rapid development of the legal environment course in business schools is at least partially due to the "trend in society to use law and litigation as the primary tools for social engineering." *Id.* at xx.

⁷⁵ *Id.* at xix. This can be described as the operational phase of the curricula change suggested by Gordon-Howell and Pierson. However, they only received half of what they called for in their reports. Clearly the development of legal environment courses has been widespread. Equally clear is the continued existence of traditional business law courses that Gordon-Howell sought to eliminate.

⁷⁶ Bailey, *supra* note 65, at 235.

⁷⁷ Professor Summers proffers "pragmatic instrumentalism" as "our most influential theory of law in jurisprudential circles [and] in the faculties of major law schools..." Robert S. Summers, *Pragmatic Instrumentalism In Twentieth Century American Legal Thought—A Synthesis And Critique of Our Dominant General Theory About Law And Its Use*, 66 CORNELL L. REV. 861-62 (1981).

"must be experimental, especially given the rapidity of social change."⁷⁸ It is through "a pragmatic method of trial and error"⁷⁹ that we need to test the notion of *managing the legal factor* as a potential new approach or direction in legal studies education.

III. LEGAL IMPLICATIONS OF BUSINESS DECISION MAKING

Professors Wiesner and Glaskowsky believe that the time is right to add a third strain of courses to the legal studies or business law curricula. This third area for want of better nomenclature will be referred to as the legal implications of business decision making or *managing the legal factor*. A panel convened at the 1994 Annual Meeting of the Academy of Legal Studies in Business posed the question as follows: "[S]hould there be a third area of legal studies, one that attempts to train future managers to work more effectively with the legal system and its agents?"⁸⁰ It was not the first time that this issue has been raised. One commentator in 1969 stressed the teaching of business students of the "necessity of an alertness to possible [legal and regulatory] requirements"⁸¹ impacting upon a business decision. This preventive or managerial approach to law instruction is aimed at avoiding the costly legal pitfalls of *learning* business law in the courtroom.⁸² The notion of *managing the legal factor* is directly addressed by this commentator:

The training which will make the business[person] alert to possible legal requirements brings us to two other considerations; (1) *how* to select a lawyer and (2) *when* to consult. ...Even though the legal adviser is consulted to accomplish certain ends, the business[person] cannot resign from the matter. He [or she] *must cooperate actively*.^{*3}

⁷⁸ *Id.* at 864.

⁷⁹ *Id.*

⁸⁰ Panel Discussion, *Training Managers in Lawyer-Manager Relationships*, Annual Meeting of the Academy of Legal Studies in Business, Dallas (August 12, 1994).

⁸¹ Elcanon Isaacs, *Importance of Studying Business Law*, in *THE DYNAMIC WORLD OF EDUCATION FOR BUSINESS* 42 (Preston P. Le Breton ed., 1969).

⁸² The preventive nature of this approach is intimated by this commentator: "It is believed that with proper guidance in courses in business law, such education in a much more expensive school of law [the courtroom] can be largely avoided." *Id.* The more currently popular nomenclature would be the importance of performing a due diligence investigation of the possible legal implications of a business decision. "If a business [person] is not conscious of the *necessity of an investigation*, nothing can help him [or her] later if a problem, *arising from oversight*, develops." *Id.* (emphasis added).

⁸³ *Id.* at 42-43 (emphasis added).

Graduating managers knowledgeable in the workings of the legal system, in the mind-set of lawyers, and the factors that result in escalating legal costs are likely to gain heightened importance in today's competitive, cost conscious business environment. The Wiesner and Glaskowsky text is premised on the belief that management of the lawyer-client relationship and management of litigation are skills that should be discussed in our schools of business. The need to impart these skills was noted in the Council for Professional Education for Business recommended publication *Importance of Studying Business Law*.^M It states that it is "not enough to leave the legal problems to the lawyer because frequently the business problem is so closely bound up with the legal problem as to be indistinguishable."⁸⁵

One may argue that this is an extension of the legal environment of business approach. If one wants to pigeonhole, then managing the legal factor is an environmental one in that it concentrates on the business process and the manner in which legal professionals and business executives deal with business problems having legal implications. However, the perspective of the managerial approach is clearly different. Whereas the traditional environmental text is more macro or institutional in approach,⁸⁶ the managerial style is more micro or transactional in scope. The future manager is taught to recognize the legal implications of specific business problems and the manner in which one might deal with them. The cases have been selected for the express purpose of setting the business environment in relation to its legal aspects. The legal consequences of a business decision are flushed out to assist the student in making a decision that was previously presented as being nonlegal in nature. The text is aimed at eliciting more than the rules of law. It continues to probe the student for the business relevance of making legal decisions.

For example, the decision to appeal or to defend an appeal is approached from a practical, managerial perspective. Along, with a more traditional explanation of the appellate process, the authors discuss the nonlegal factors that should be taken into account in managing the legal factor. "The decision to appeal...should be based on business reasons, taking into account the costs involved and the estimated probability of reversal."⁸⁷ Other strategic elements are also discussed in the business decision to appeal including the difference

⁸⁴ *Id.* at 41.

⁸⁵ *Id.* at 43 (emphasis added).

⁸⁶ Examples are the study of legal institutions, government regulation of business, and constitutional rights.

⁸⁷ Wiesner & Glaskowsky, *supra* note 13, at 210.

between an appeal on the facts and an appeal on a ruling of law, the rates of reversal, the reasons for reversals, and the filing of an appeal as a tactic "in negotiating a settlement."⁸⁸

Much of the input needed to make these types of decisions will come through consultations with legal counsel. The importance of the manager-lawyer relationship is a major focus of the text. In order to *manage* or consult attorneys, the authors believe that knowledge of the legal mind-set is vital. Chapters entitled *The Legal Professional*⁸⁹ and *Working With the Legal Professional*⁹⁰ offer coverage that have not been seen before in a business law or legal environment text. The former chapter looks into the world of the legal professional from the law school experience to lawyer behavior and conflict of interest. This knowledge is then used to explore ways to best utilize attorneys in business. The student is invited to explore ways a businessperson may manage the attorney-client conference, the negotiation process, and the litigation process. The student is counseled that a business manager should play a proactive role in pre-negotiation, negotiation, and litigation matters. She is invited to explore the many considerations to be taken into account in deciding to begin litigation and how best to manage it once the decision to commence a lawsuit has been made. "[T]he prudent client has a clear understanding of what the lawyer is attempting to accomplish by [various] legal maneuvers."⁹¹

One possible criticism of the introduction of this type of material into the legal studies curriculum is that it smacks of self-help vocationalism unfit for a professional school of education. The new chapter on *Working With Professionals* presents the types of issues that one may question as being too non-intellectual a subject matter. In words taken from Professor Pierson's landmark study, business schools must avoid the appearance of being a trade school for business.⁹² The threat of an appearance of vocationalism is tempered by how the material is presented. Wiesner and Glaskowsky's managerial approach is primarily aimed at developing the student's analytical abilities.

A better critique would be not whether material can be labeled as vocational but whether the material is presented in a way that meets

⁸⁸ *Id.* at 206.

⁸⁹ *Id.* at 132-175 (Chapter 4).

⁹⁰ *Id.* at 176-222 (Chapter 5).

⁹¹ *Id.* at 202. The legal maneuvers discussed include the discovery process and motion practice. The authors conclude that "[m]anagers should develop a facility for recognizing and applying cause and effect when dealing with litigation."

⁹² Pierson, *supra* note 2, at 52.

the standards of a professional education. Can this new material be presented in such a way to stand up to the rigors of academic examination? *Managing The Legal Factor's* analytical presentation leads one to the conclusion that material on the attorney mind-set, legal costs, and managing litigation can withstand the rigors of such an examination. This new material is presented by the time tested vehicle of the case method.⁹³ Cases are presented to sharpen the students' analytical abilities on such non-traditional topics as litigation settlement,⁹⁴ contracting for legal services,⁹⁵ legal research,⁹⁶ the decision to appeal,⁹⁷ and fee arrangements.⁹⁸

IV. CONCLUSION

Given the ever-growing entanglement of business and legal factors in business decision making, managing the legal factor material is an appropriate and useful addition to the legal studies curriculum. One may argue that a full course, along the lines of the *Miami Model*⁹⁹ is warranted. A possible alternative is the inclusion of this material into a more traditional legal environment course. The discounting of the material out of hand as nonprofessional vocationalism is short-sighted. The importance for business schools to present material covering issues vital to managing in the real world is self-evident.

The paramount issue is how best to implement the managing the legal factor material into the legal studies curriculum so that it can be used to develop the analytical skills of the student. This litmus test for curriculum development has long been recognized. Professor Pierson acknowledged the importance of "developing the students'

⁹³ "Case analysis stimulates thinking and consideration of the extent to which the law is addressing itself to the social and business of the time. Grilliot, *supra* note 28, at xv.

⁹⁴ *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524 (11th Cir. 1990) (refusal to settle and Rule 68 of the Federal Rules of Civil Procedure).

⁹⁵ *Lieberman v. Stollman*, 595 N.E.2d 8 (111. 1991) (suit for attorney's fees).

⁹⁶ *Good Timez v. Phoenix Fire & Marine Ins. Co.*, 754 F. Supp. 459 (D.V.I. 1991) (collection of attorney's fees from insurance company).

⁹⁷ *Erbstoezer v. American Cas. Co.*, 486 N.W.2d 549 (Wis. 1992) (appeal based upon a question of law).

⁹⁸ *In re Kucek Development*, 113 B. R. 652 (E.D. Cal. 1990) (legality of contingency fee arrangement); *Security Management Corp. v. Kessler*, 599 So.2d 1033 (Fla. 1992) (use of motions to correct errors and the formalities needed for a fee agreement).

⁹⁹ *See Sacasas & Cava, supra* note 11.

capacity for analytical investigation and for responsible action."¹⁰⁰ Professor Allison some thirty-two years later remarked that legal studies courses "should be taught from the perspective of planning, prevention and managerial participation in the resolution of legal problems."¹⁰¹ *Managing The Legal Factor* is a commendable and creative effort at pursuing these mandates.

100. Pierson, *supra* note 2, at 213. Ten years later another commentator echoed Professor Pierson's thoughts. "One of [the forms of discipline that should be developed in teaching business law] is training in decision making which is an important part of the equipment of a future executive." Issacs, *supra* note 81, at 43.

¹⁰¹ John R. Allison, *The Role of Law In The Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 239, 246 (1991). Professor Allison's observations regarding the need for prevention, planning, and management are expressed objectives of the *Managing The Legal Factor* text. For example, as noted by the authors, "[t]he text offers suggestions for managing the high legal costs that plague modern industry...presents the legal institutional environment that interfaces with business...and encourage[s] [the reader] to speculate whether the financial effects of the legal problem could have been diminished by a preventive business policy." Wiesner & Glaskowsky, *supra* note 13, at 45.